depositor any money paid in the erroneous belief that a collection had been effected.[17]

A novel situation was presented to the court in the recent case of *Bank of Big Cabin* v. *English* (1910) 111 Pac. 386. Here the plaintiff directed his agent to forward the proceeds of the sale of certain goods to the defendant bank. The agent's banker, however, instead of forwarding the money paid it to a third bank which, in pursuance of directions received, credited the defendant on behalf of the plaintiff. The defendant thereupon credited the plaintiff with the amount in question, but on learning that the intermediate bank had later become insolvent, sought to cancel this credit. The plaintiff argued that the payment to the intermediate bank was payment to the defendant and that the credit in his favor was therefore unconditional. The court, however, very properly reached the conclusion that the circumstances of the case were in their legal effect analagous to those involved in a contract for collection and that the credit in favor of the plaintiff must have been intended to be provisional only and could consequently be cancelled. The view thus adopted, that the defendant received the credit as it would a draft on another bank, is not only consistent with the facts, but also in perfect harmony with the unmistakable tendency of the courts to deny the existence of the debtor relation until an actual mingling of funds has occurred.

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EFFECT OF JUDGMENT AGAINST THE PRINCIPAL IN SUBSEQUENT ACTION ON SURETY'S SEVERAL CONTRACT.—It is fundamental that in the absence of fraud, collusion, or want of jurisdiction, which always furnish ground for collateral impeachment, a judgment is conclusive between parties and privies only, except as to the fact of its rendition. The applicability of this doctrine to the relation of principal and surety necessitates an inquiry into the precise nature of the latter's obligation.[1]

Whenever, as in bail,[2] replevin,[3] or injunction[4] bonds, he undertakes to abide the event of judicial proceedings, no peculiar principle of *res adjudicata* or of suretyship need be invoked, for it is obviously the very nature of his contract that liability shall attach as the result of a judicial determination adverse to his principal. Such was the recent case of *Calhoun* v. *Gray* (Mo. 1910) 131 S. W. 438, in which the surety was sued on a bond conditioned for the payment of all costs which might accrue in a certain action. In deciding the effect of an adjudication against the principal for such costs, the court considered that had the obligation taken the more usual form in which the surety binds himself for the faithful discharge of official duties or the due performance of a contract, the judgment would have been merely *prima facie* evidence of his liability, but that since he had actually contracted to answer for whatever costs were awarded in the action then pending, the judgment therein must be conclusive. Although, in view of the character of the defendant's undertaking, the result reached is undoubtedly correct, the position taken with respect

[17]East-Haddam Bank *v.* Scovil (1837) 12 Conn. 303.

[1]The discussion will be confined to suretyship in its narrowest sense.

[2]McChristal *v.* Clisbee (1906) 190 Mass. 120.

[3]Richardson *v.* Bank (1897) 57 Oh. St. 299; Kennedy *v.* Brown (1878) 21 Kan. 171.

[4]Lothrop *v.* Southworth (1858) 5 Mich. 436.

to the effect of such a judgment in the usual case involves a question upon which the decisions show widely divergent views.

Under the familiar rule that a final determination against one of two joint obligors merges the entire cause of action,[5] it may well be said that where a contract is made jointly by principal and surety, a judgment against the former upon that contract must necessarily conclude the latter. Obviously such is not the situation where the surety makes a several contract. Since his obligation is directly to the creditor, there is not even privity of contract between principal and surety, and consequently no room for an application of the rule that a judgment binds parties and privies.[6] Still it has frequently been held, even in such cases, that a final determination of the principal's default would be conclusive as to the surety's liability although he were not a party to the suit.[7] In reaching this result, many of these courts have apparently applied the similar rule of the civil law. It is evident, however, that the doctrine there enunciated affords no true analogy, for in that system of jurisprudence principal and surety are identified to such an extent that the latter has an absolute right to make himself a party to the suit against the former, and even to appeal from the judgment. But since the common law confers upon him no such right,[8] it cannot give to the judgment a conclusive effect without disregarding the eminently just principle which accords to every man his day in court.[9] It is of course true that an adjudication adverse to the principal establishes as to him the fact of his default; yet as against the surety it determines nothing.[10] Indeed, the true measure of the latter's obligation would seem to be to pay whatever sum is really due, rather than the amount of any judgment that may be recovered against the principal. In other words, the liability is to attach only as the result of a judicial determination thereof in an action to which he was a party and which he had an opportunity to defend.[11] To imply a different agreement, as has sometimes been done, would seem to be wholly unwarranted and to ignore the true nature of the contract which he has made.[12]

Many courts which properly decline to consider the judgment con-

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[5]2 Black, Judgments § 770.

[6]The same considerations which govern a several contract of suretyship are applicable where, although the surety's obligation is made jointly with the principal, the judgment against the latter is not recovered upon that contract. The only possible ground for arguing that there is privity in such case between principal and surety, is that they, as joint obligors, are privies in contract. Even if this position were a tenable one, which seems doubtful, mere privity of contract is not sufficient to bring the persons of whom it is predicated within the rule that a judgment binds only parties and privies. McConnell *v.* Poor (1901) 113 Ia. 133; Giltinan *v.* Strong (1870) 64 Pa. St. 242; 2 Black, Judgments § 549.

[7]Masser *v.* Strickland (Pa. 1828) 17 S. & R. 354; Evans *v.* Commonwealth (Pa. 1839) 8 Watts. 398; Deegan *v.* Deegan (1894) 22 Nev. 185.

[8]See Munford *v.* Overseers (Va. 1824) 2 Rand. 313; McKellar *v.* Bowell (N. C. 1825) 4 Hawks. 34; Jackson *v.* Griswold (N. Y. 1842) 4 Hill. 522; Douglass *v.* Howland (N. Y. 1840) 24 Wend. 35.

[9]See Douglass *v.* Howland *supra;* McConnell *v.* Poor *supra.*

[10]See McConnell *v.* Poor *supra.*

[11]See Pico *v.* Webster (1859) 14 Cal. 203; Thomson *v.* MacGregor (1880) 81 N. Y. 592.

[12]Thomson *v.* MacGregor *supra.*

clusive, admit it nevertheless as *prima facie* evidence of the surety's liability.[13] It is to be observed, however, that except as between parties and privies, a judgment is not competent to prove the facts upon which it is based,[14] and furthermore, if properly admissible, it is conclusive of such facts.[15] Still it is contended that since the surety may avail himself of a determination in favor of his principal,[16] the doctrine of mutuality requires that a judgment adverse to the principal be admissible against the surety. This argument apparently overlooks the fact that the latter can claim the benefit of the judgment in favor of his principal not because the creditor is estopped, but because it extinguishes the debt and consequently destroys, as a mere incident thereto, the obligation of the surety.[17] Moreover, since a judgment for the principal concludes the creditor,[18] this doctrine, if applicable at all, would operate to make the judgment conclusive and not *prima facie* evidence. Here too it would seem equally unavailing to resort to the terms of the contract in an attempt to justify this position, on the theory that the surety may be considered as having stipulated to become liable for whatever damages may be fixed in an action against the principal alone. If such were the agreement it is clear that the judgment should, merely by virtue of the contract, be conclusive of the surety's liability, rather than mere presumptive evidence. It is submitted, therefore, that unless the surety has agreed to be bound by the result of judicial proceedings, no rule of suretyship or of *res adjudicata* requires that in a subsequent action on his several contract,[19] a judgment adverse to the principal should be evidence of the surety's liability.[20]

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NATURE OF A BUSINESS CONDUCTED BY A RECEIVER.—The appointment of a receiver is the recognized method employed by equity to preserve property pending litigation,[1] and by virtue of such proceedings the court in effect sequestrates the assets for the benefit of all who may ultimately prove an interest in them.[2] Inasmuch as a receiver is an

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[13]City of Lowell *v.* Parker (Mass. 1845) 10 Met. 309; Stephens *v.* Shafer (1879) 48 Wis. 54; Graves *v.* Bulkely (1881) 25 Kas. 249; Fletcher *v.* Jackson (1851) 23 Vt. 581; Berger *v.* Williams (1849) 4 McLean 577; Charles *v.* Hoskins (1863) 14 Ia. 471.

[14]2 Black, Judgments §§ 534, 600.

[15]Bethlehem *v.* Watertown (1883) 51 Conn. 490; Lucas *v.* Governor (1844) 6 Ala. 826; Arrington *v.* Porter (1872) 47 Ala. 714; Carmichael *v.* Governor (Miss. 1839) 3 How. 236; People *v.* Russell (N. Y. 1881) 25 Hun. 524; Pico *v.* Webster *supra.*

[16]Lamb *v.* Wahlenmaier (1904) 144 Cal. 91.

[17]See Jackson *v.* Griswold *supra;* McConnell *v.* Poor *supra.*

[18]State *v.* Parker (1882) 72 Ala. 181; Gill *v.* Morris (Tenn. 1882) 11 Heisk. 614; Crum *v.* Wilson (1883) 61 Miss. 233.

[19]And see note 6 *supra.*

[20]Pico *v.* Webster *supra;* McConnell *v.* Poor *supra;* Jackson *v.* Griswold *supra;* Giltinan *v.* Strong *supra;* Thomson *v.* MacGregor *supra;* Clark *v.* Montgomery (N. Y. 1856) 23 Barb. 464; De Greiff *v.* Wilson (1879) 30 N. J. Eq. 435; Grafton *v.* Hinkley (1901) 111 Wis. 46.

[1]High, Receivers § 9; Alderson, Receivers § 2.

[2]Ellicott *v.* Warford (1853) 4 Md. 80; Delany *v.* Mansfield (1825) 1 Hogan 234.